Omnitest Inspection Services, Inc. and Daniel McCool *and* Patrick Barrett

Omnitest Inspection Services, Inc.; Amspec Technical Services, a Partnership; Amspec Technical Services, Inc. and Daniel McCool *and* Local 2B, International Union of Operating Engineers, AFL–CIO and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO, Party in Interest. Cases 22–CA–14369 and 22–CA–14673

February 14, 1994

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND TRUESDALE

On June 23, 1993, Administrative Law Judge Steven Davis issued the attached supplemental decision. The General Counsel filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief[1] and has decided to affirm the judge's rulings, findings, and conclusions as modified below and to adopt the recommended Order as modified.

As more fully detailed in the judge's supplemental decision, the compliance specification in this proceeding alleged the personal liability of Daniel McCool, as well as the liability of three business entities in which he was a principal, for the backpay allegedly due to remedy the unlawful conduct found in the underlying unfair labor practice proceeding. On the personal liability question, the judge concluded in his decision that although the relevant allegations of the specification were deemed admitted because of the failure of McCool or any of the Respondents to answer them, the allegations on their face were insufficient to support a summary finding of personal liability consistent with Board precedent. He analogized the procedural circumstances to Board decisions in which the General Counsel moved for summary judgment on unanswered complaint allegations seeking a *Gissel* bargaining order. The Board denied the motions in those cases because, although uncontested, the allegations did not make out an adequate factual basis to support such a remedy. See, e.g., *Harbor Crossing Skilled Nursing Care Facility*, 308 NLRB No. 27, slip op. at 4–5 (Aug. 11, 1992) (not reported in Board volumes) and *FJN Mfg.*, 305 NLRB 656, 657 (1991), and cases cited there. The judge noted, however, that in those decisions the cases were remanded for hearing following the denial of the summary judgment motions, while here the General Counsel, in the context of a hearing, relied on the allegations alone without further litigation. He dismissed the personal liability allegations on that basis.

Although we find no fault with the judge's statement of the appropriate legal standard for a finding of personal liability, and we agree that, similar to the *Gissel* summary judgment cases cited above, the compliance specification's allegations are inadequate for an uncontested finding of personal liability, we do not agree that dismissal of the allegations is an appropriate disposition here. At the beginning of the hearing, the judge clearly treated the unanswered personal liability allegations as a matter for summary judgment, and he in fact granted summary judgment in the General Counsel's favor, thereby obviating any further litigation of the question of McCool's personal liability. In his subsequent decision he effectively withdrew his grant of summary judgment and on further consideration rejected the theory that judgment was proper on the face of the pleadings. This is tantamount to a denial of a Motion for Summary Judgment. The General Counsel was not provided an opportunity to present evidence on the personal liability issue at any time after the judge had decided to reconsider his summary ruling at the hearing. In these circumstances, the General Counsel is entitled to a hearing on the issue of McCool's personal liability, as requested in the General Counsel's exceptions to the Board. Accordingly, we will remand this proceeding for that purpose.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Omnitest Inspection Services, Inc., Amspec Technical Services, a Partnership, and Amspec Technical Services, Inc., Woodbridge, New Jersey, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete the second paragraph of the judge's Order.

2. After the end of the judge's Order, insert the following additional paragraph:

''IT IS FURTHER ORDERED that this proceeding is remanded to the Regional Director for Region 22 for further appropriate action, including the holding of a hearing before Administrative Law Judge Steven Davis on the matter of the personal liability of Daniel McCool. The judge shall prepare and serve on the parties a Second Supplemental Decision setting forth the

[1] The General Counsel excepted to the judge's dismissal of personal liability allegations against Daniel McCool. Exclusive of this matter, we adopt the judge's supplemental decision in the absence of exceptions.

[2] Member Truesdale joins his colleagues in remanding this proceeding for a hearing to provide the General Counsel an opportunity to present evidence on the personal liability issue. However, Member Truesdale finds it unnecessary to rely on the *Gissel* summary judgment cases cited above.

resolution of such issues, findings of fact, and recommendations, including a recommended Order, where appropriate, regarding the issues on remand. Copies of the Second Supplemental Decision shall be served on all parties after which the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.''

Bradley R. Williams, Esq., for the General Counsel.
Fred R. Kimmel, Esq. (Fred R. Kimmel & Associates), of Chicago, Illinois, for Daniel McCool.
Walter Russell, Business Agent, for Local 2B.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. On February 16, 1990, the National Labor Relations Board issued its Decision and Order (297 NLRB 752), finding that Respondents Omnitest Inspection Services, Inc. (Omnitest), Amspec Technical Services, a Partnership, and Amspec Technical Services, Inc., had unlawfully discharged Patrick Barrett, and repudiated its collective-bargaining agreement with Local 2B, International Union of Operating Engineers, AFL–CIO (the Union).

Respondents were ordered to reinstate Barrett and make him whole for any loss of earnings and other benefits. They were also ordered to transmit to the Union the contributions to the health and welfare fund and the pension, as required by the union contract, and to make whole the unit employees for any losses they suffered from the failure of OTIS/Amspec to continue to honor the collective-bargaining agreement with the Union. On June 28, 1991, the United States Court of Appeals for the Third Circuit enforced in full the Board's Order. (937 F.2d 112.)

On July 30, 1992, the Regional Director for Region 22 issued and served the instant compliance specification and notice of hearing. The specification was served on Daniel McCool, at Omnitest, and on Fred R. Kimmel, the attorney who represented Respondents in the court of appeals. Thereafter, McCool requested an extension of time to file an answer, and on August 18, the Regional Office extended the time to answer. The order extending time to answer was not served on Kimmel.

By letter dated 26, 1992, McCool filed a five-page answer to the specification.

A hearing was held before me on January 19, 1993, in Newark, New Jersey. At the hearing, an appearance was entered for McCool only, by Attorney Kimmel. No appearance was made in behalf of Omnitest, Amspec Technical Services, a Partnership, or AMPEC Technical Services, Inc. Following the hearing, briefs were received from the General Counsel and McCool.

Personal Liability

The specification alleges, that, in addition to the corporate Respondents, Daniel McCool, an individual, is personally liable for the payment of the backpay due. Specifically, the specification, in relevant part, alleges as follows:

> At all times material herein, Daniel McCool, an individual, has been the principal owner of the companies comprising Respondent, and has formulated, implemented, and administered all labor relations policies affecting its employees.
>
> At all times material herein, Daniel McCool, an individual, has been solely responsible for, and made all decisions concerning, all financial, business and other affairs of the companies comprising Respondent.
>
> On or about a date or dates unknown to the General Counsel but particularly within the knowledge of Respondent, Daniel McCool intermingled his assets and affairs with those of Respondent, including leasing his personal trucks and equipment to the companies comprising Respondent.
>
> By virtue of the acts and conduct described above . . . the corporate veil of Respondent has been pierced, and Respondent Daniel McCool is personally liable for the backpay due.

The answer filed by McCool was silent as to the allegations concerning his alleged personal liability.

The Motion to Amend the Complaint: At the hearing, McCool's attorney moved to amend the answer to deny the above allegations concerning McCool's personal liability. The General Counsel objected to the motion, and I denied it, ruling that not having answered those allegations, Respondents had admitted them.

McCool argues that he was denied due process in not being permitted to amend the answer as requested. He first argues that the only issue which may be alleged in a compliance specification is ''the amount of backpay due.'' However, Section 102.55 of the Board's Rules and Regulations provides that allegations ''other than the amount of backpay due'' may be set forth therein. In *Riley Aeronautics Corp*., 178 NLRB 495, 500 (1969), the issue of personal liability was litigated at the compliance hearing even though the person involved was not alleged in the specification in his individual capacity. See also *Chef Nathan Sez Eat Here*, 201 NLRB 343 (1973).

Here, in contrast, McCool was properly alleged as an individual, and specific allegations were made in the specification concerning his personal responsibility for remedying the allegations of the specification.

Moreover, the Board in the underlying unfair labor practice case in, expressly stated that the issue of personal liability could be raised in this compliance hearing:

> Following the issuance of the judge's decision, the General Counsel moved to reopen the record and amend the complaint in order to name Daniel McCool, president and part-owner of each of the named Respondents, as an individual party-respondent, based on alleged newly discovered evidence showing that Amspec has gone out of business, and that McCool is removing all of his personally owned assets, i.e., equipment and vehicles, from that Company. Respondent Amspec's counsel, on behalf of McCool, opposed amendment of the complaint, arguing inter alia, that it is precluded by Sec. 10(b) of the Act and would be prejudicial to McCool, who was neither named in the

> charge or complaint nor given notice that he could be held liable as a party-respondent.
>
> The Board has discretion to grant motions to amend the complaint after the close of the hearing. [Citations omitted.] Although in the exercise of this discretion we shall deny this motion, our action does not preclude the General Counsel from raising the issue of McCool's personal liability in the compliance stage of this proceeding. [Citations omitted. 297 NLRB 752 fn. 3.]

Section 102.56(b) and (c) of the Board's Rules and Regulations provides that

> [t]he answer shall specifically admit, deny, or explain each and every allegation of the specification. . . .
>
> If the respondent files an answer to the specification but fails to deny any allegation of the specification required . . . by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

McCool was put on notice on February 16, 1990, the date of the Board's decision, that the issue of his personal liability might be raised in the compliance specification. He was then specifically put on notice when such allegations were set forth in the specification. McCool's attorney argued at the hearing that McCool should be excused from his failure to deny those allegations of the specification because he was a layman who was not familiar with these proceedings, and did not then have an attorney. It should be noted that although Kimmel did not represent Respondents in the underlying unfair labor practice proceeding, he did represent them at the court of appeals on the Board's petition for enforcement.

The matters alleged concerning McCool's personal liability are within Respondents' knowledge. Accordingly, on Respondents' failure to deny those allegations of the complaint related to McCool's personal liability, Section 102.56(c) permits a finding that such allegations were admitted. I so ruled, and I reaffirm that ruling.

The Board's Rules and Regulations seem to permit an amended answer to the specification only where the specification has been amended by the Regional Director. Section 102.56(e). However, ''the Board has held that, even in the absence of an amended backpay specification, a respondent may amend its answer prior to the hearing in the matter.'' *Aquatech, Inc*., 306 NLRB 975, 976 (1991); *Vibra-Screw, Inc*., 308 NLRB 151, 152 (1992). Here, however, the motion to amend the answer was not made prior to the hearing. It was made at the hearing, at which time the General Counsel objected, claiming surprise and prejudice due to his reliance on Respondents' failure to answer those allegations, and his consequent apparent unpreparedness to prove those allegations.

I accordingly reaffirm my denial of McCool's request to amend his answer at the hearing.

The Adequacy of the Specification: The specific allegations, set forth above, which I have found to have been admitted due to Respondents' failure to deny them, establish that McCool (a) was the principal owner of Respondents, who has formulated, implemented, and administered all labor relations policies for its employees, (b) was solely responsible for, and made all decisions concerning all financial business and other affairs of Respondent; (c) intermingled his assets and affairs with those of Respondents, including leasing his personal trucks and equipment to Respondents, and (d) by virtue of the above, the corporate veil of Respondents has been pierced, and McCool is personally liable for the backpay due.

Although the above allegations are deemed to be admitted, the question becomes whether they are sufficient, on their face, to warrant a finding that McCool is personally liable for the backpay due. *FJN Mfg*., 305 NLRB 656 (1991).

The Board has held that in determining whether to pierce the corporate veil, and find personal liability in a backpay context, the most important consideration is the degree to which the individual made personal use of the assets of the corporation. *IMCO/International Measurement Co*., 304 NLRB 738 (1991).

In *Riley Aeronautics Corp*., 178 NLRB 495, 501 (1969), in discussing what types of conduct are necessary to make a finding of personal liability, the Board found that

> the courts and Board have looked beyond organizational form where an individual or corporate employer . . . so integrated or intermingled his assets and affairs that ''no distinct corporate lines are maintained.''

The cases cite detailed and specific instances of personal use of corporate assets, including using the profit from the corporation's sale of a residence, to purchase a new personal residence; receiving the profit from the sale of a corporate vehicle; and receipt of the profits from the corporation's sale of a yacht. *IMCO*, supra. Further examples of the intermingling of personal funds with the corporation's assets are the individual's taking money from the corporations; receiving the assets of the corporations when they ceased operations; use by the corporation of the individual's personal funds and credit cards; personal guarantee of millions of dollars in corporate debts; a million dollar loan to the corporation with no security for such loan; manipulation of the corporations at the whim of the individual, forming and discarding corporations to meet his needs; and due to the individual's integration and intermingling of assets and affairs with those of the corporation, no distinct corporate lines existed. *Honeycomb Plastics Corp*., 304 NLRB 570 (1991). See also *Dahl Fish Co*., 299 NLRB 413, 419 (1990).

Here, in contrast, the specification sets forth only that McCool ''intermingled his assets and affairs with those of Respondent, including leasing his personal trucks and equipment to the companies comprising Respondent.'' The only specific act constituting an unlawful intermingling of assets set forth in the specification is the leasing of McCool's personal trucks and equipment to Respondents. On its face, such activity is not unlawful, and does not warrant a finding of intermingling of assets and affairs.

The detail required in making such a finding, where the General Counsel relies on the fact that no answer has been filed to these allegations, must be more specific and set forth specifically the allegedly unlawful conduct, which must be unlawful on its face. The ''degree to which'' McCool made

personal use of the assets of Respondents has not been identified. I am aware that the allegation notes that the leasing of the trucks is only one of the instances of intermingling, and there may be others. Nevertheless, the General Counsel has not specified them, and no determination may be made as to the degree to which McCool made personal use of Respondents' assets or whether the corporate and personal lines have become blurred.

While it is true that I have also found that Respondents admitted that allegation which alleges that ''Respondent Daniel McCool is personally liable for the backpay due'' because of his failure to answer that paragraph, that paragraph is conclusionary only, and its basis exists only by virtue of its reference to the earlier paragraphs. Thus, the paragraph states:

> By virtue of the acts and conduct described above in paragraphs 21(a)–(c), the corporate veil of Respondent has been pierced, and Respondent Daniel McCool is personally liable for the backpay due.

Accordingly, if the factual basis for a finding of personal liability does not appear, the conclusion may also not stand.

In a similar context, the Board has found complaints in bargaining order cases insufficient to support a Motion for Summary Judgment based on their factual allegations, because they do not allege facts sufficient to enable the Board to evaluate the pervasiveness of the violations. Thus, they did not allege the size of the unit or the extent of dissemination of the violations among the employees. *Harbor Crossing Nursing Facility*, 308 NLRB No. 27 (1992) (not reported in Board volumes); *FJN Mfg*, supra.

Summary judgment was denied in those cases, and the matters were remanded for hearing. Here, however, at hearing, the General Counsel has relied on Respondents' failure to answer the specification, and therefore the specification must stand or fall based on whether the allegations there are factually sufficient to support a finding of personal liability. I find that they are not, and I will recommend dismissal of those paragraphs alleging the personal liability of McCool.

The Backpay Computations

Patrick Barrett: Barrett was discharged on February 14, 1986, from his position as a level 1 technician. Although McCool argues that Barrett never passed a level 1 examination, the Board and the court of appeals found that he was employed as a level 1 technician, and I am bound by such findings.

The Backpay Period: The General Counsel asserts that Barrett's backpay period continues until Respondent ceased operating their facility in August 1988. McCool argues that Barrett's backpay should terminate on July 29, 1986.

McCool testified that Respondents employed 2 types of technicians: level 1 and level 2. He stated that the level 1 employees were in effect, assistants, who could not work without the presence of a level 2 technician, pursuant to rules of the American Society for Nondestructive Testing which purportedly require that a level 2 technician sign any inspection conducted. Level 1 technicians are not authorized to sign such inspection reports.

McCool further stated that business declined to such an extent that by July 29, 1986, Respondents laid off all the level 1 technicians, and thereafter continued to employ only level 2 technicians, specifically, David Geisendorfer and Randy Pridenmore. Respondents continued their business, employing only level 2 technicians, until August 1988, when they ceased doing business.

Accordingly, McCool argues that Barrett's backpay period should end on July 29, 1986, when Respondents ceased employing level 1 employees. The level 1 technicians laid off at that time were Gary Whisenhunt and Brian Hale.

Thus, McCool argues that Barrett would have been laid off no later than July 29, 1986, when the last level 1 technician was laid off, and that his backpay period should end then.

The General Counsel argues that there has been no proof that Geisendorfer or Pridenmore were level 2 employees, and even if such proof has been shown, that there is no evidence that they were more qualified than the level 1 technicians to perform the work that they did subsequent to July 1986. However, the collective-bargaining agreement does make reference to a level 2 category, and further sets forth wage rates for the positions of ''Technician'' and ''Assistant Technician.''

The contractual wage provisions provide for a salary of $8.70 for the assistant, or level 1 technician, for the calendar year of 1986. This amount, plus a 2.5-percent increase granted pursuant to a March 1985 letter of understanding attached to the contract, results in a wage of $8.91, which is the amount set forth in the specification payable to Barrett, Hale, and Whisenhunt. Accordingly, the General Counsel regards them as level 1 technicians.

Similarly, the $12.10 wage rate provided in the contract for the technician, or level 2 technician, plus a 2.5-percent increase, constitutes a wage rate of $13.17, which is the wage rate set forth in the specification payable to David Geisendorfer and Kim Geisendorfer for the calendar year 1987. Accordingly, the General Counsel regards them as being level 2 technicians.

The position of Pridenmore is questionable. There was no evidence, specifically, as to whether he was a level 1 or level 2 employee. However, McCool testified that he was employed after July 1986 when no level 1 employees were employed by Respondents. However, the contractual wage rate as set forth in the specification for Pridenmore is $10.50. This is more than the $8.91 contractual wage rate for level 1 technicians, but less than the $13.17 rate for level 2 technicians. No explanation of this wage rate was given at the hearing. I can only assume that this was the wage rate paid to Pridenmore, and not the contractual amount. That being the case, it would not be likely that Respondents would pay Pridenmore more than the $8.91 rate payable to a level 1 technician if he was in fact a level 1 technician. Rather, it seems more likely, in view of the fact that McCool's attorney conceded that Respondents had not paid the contractual wage rate, that Pridenmore was in fact a level 2 employee, entitled to a wage rate of $12.40 ($12.10 + 2.5% (30 cents)) in the calendar year 1986.

Accordingly, I find that Pridenmore was a level 2 technician.

Therefore, I find that no level 1 technicians were employed by Respondents following Whisenhunt's dismissal in July 1986. The question then becomes whether level 1 technicians, such as Barrett, could have continued to be employed by Respondents. McCool testified that because of a

decline in business, and the nature of the work that Respondents had at that time, walk-on inspections of refineries, such work could be done by one person. Level 2 technicians were retained to perform this work, and not level 1 technicians, because only the level 2 technicians were authorized to sign inspection and certification forms, and that Respondents at that time performed much work for customers which required such certifications. Indeed, the collective-bargaining agreement provides that ''only Level II personnel shall be allowed to read films and at least one Level II Technician shall be assigned per each unit.''

McCool conceded that in the past, Respondents sent a level 1 and a level 2 technician to a job, where the customer requested it or where the job was extensive. However, that was not Respondents' standard practice.

As set forth above, McCool argues that had Barrett continued in Respondents' employ, Barrett would have been terminated for economic reasons before the end of the backpay period, at least by July 29, 1986, at which time all level 1 technicians were terminated.

> Such a contention is an affirmative defense and the burden is on Respondents to establish that discriminatees would not have remained in its employ for such nondiscriminatory reasons. Statistical probability is not enough and it must be determined what would have occurred regarding the employment of each of the claimants based on the policies of the Respondent. [*Midwest Hanger Co*., 221 NLRB 911, 917 (1975).]

I cannot find that Barrett would have been terminated prior to the other level 1 technicians, Hale, and Whisenhunt, due to his alleged failure to pass a level 1 examination, or that he was less experienced than Whisenhunt, as testified by McCool. As set forth above, Barrett was employed as a level 1 technician, and presumably was competent to perform all level 1 work.

However, I find that Respondents have met their burden of showing that Barrett would have been terminated at a time when the last level 1 technician, Whisenhunt, was dismissed, on July 29, 1986. Thus, McCool gave uncontradicted testimony concerning Respondents' requirements and its practice. There was no longer a need to employ level 1 technicians because of a decline in business, and because its few customers required the services of a level 2 technician who could sign and certify inspection reports.

This is not a case where a question exists as to which of several level 1 technicians should have been retained, where one could argue that discriminatee Barrett should have been retained, on the basis of seniority or skill. *Midwest Hanger*, supra.

Rather, this is a case where a specific category of worker, level 1 technician, was dropped from Respondents' payroll, and Respondents' business was performed by a different class of worker, the level 2 technician. No level 1 technician was employed after July 29, 1986, and there is no reason to believe that Barrett would have been employed past that date. McCool has given a reasonable, supportable basis on which a finding may be made that had Barrett continued in Respondents' employ, he would have been dismissed by the time that the last level 1 technician was dismissed, on July 29, 1986, and that he would not have been employed by them thereafter.

The Amounts Due Barrett

Respondents do not dispute the method of computations, or the figures themselves with respect to Barrett, but only the duration of his backpay, as set forth above.

Gross Backpay: As set forth in the specification, Barrett is due regular gross backpay of $2,280.96 for the first quarter of 1986, and $4,633.20 for the second quarter of 1986, which ends on June 30, 1986.

Inasmuch as I have found that Barrett would have been dismissed on July 29, 1986, gross backpay for the 4 weeks in July 1986, must be added to this sum. Thus, 4 weeks at 40 hours per week at a rate of $8.91 equals $1425.60.

In addition, the specification states that a total of 21.90 overtime hours were worked in the third quarter of 1986. Since no information was given as to what week or weeks those overtime hours were worked, I have taken the total of 21.90 hours, and divided it by the 13.2 weeks in that quarter, and obtained an average number of overtime hours worked per week in the third quarter of 1986. Thus, an average of 1.7 hours of overtime was worked per week in the third quarter of 1986. The 1.7 hours multiplied by the 4 weeks in July 1986 equals 6.8 hours overtime worked in July 1986 multiplied by the overtime rate of $13.37 or $90.91.

Thus, the gross backpay due Barrett is $2,280.96 plus $4,633.20, plus $1,425.60, plus $90.91 or $8,430.67.

Interim Earnings: With respect to interim earnings, Barrett's testimony and W-2 forms establish that following his discharge in February 1986, he diligently searched for employment, contacted personnel agencies, job placement centers, and looked in the newspapers for jobs. He also applied for work at various locations. In March 1986, he was referred by Pomerantz Personnel Company to work at Service Corporation of America. He was employed at that job for a couple of weeks as a bench technician performing warranty work on typewriters and computers. He earned $252 in that employment. In May 1986, he obtained employment as a bartender at the Bar Harbor Light. He worked until July 1986 earning a total of $739. Accordingly, Barrett's total interim employment until the end of his backpay period, July 29, 1986, amounted to $991.

The Contractual Guarantee of 40 Hours of Work

The specification sets forth, and McCool admitted at the hearing, that Respondents failed to pay certain employees the guaranteed 40-hour minimum between April 2, 1986, and August 30, 1988.

The collective-bargaining agreement provides in article VI, section (J) that ''the Company guarantees forty (40) hours of work per week for each full calendar week employed and the employee is available for work.''

McCool admits Respondents' failure to pay the guaranteed 40 hours' pay, but presented two defenses to their failure. The first is that the Union waived the contractual requirement in early 1986, and the second is that the contract expired on October 1, 1987, and was not renewed, thereby terminating, on that date, any obligation to make payments on the contract's terms thereafter.

McCool testified that in January or February 1986, he told union official Walter Russell that the 40-hour guarantee was

''killing us.'' McCool sought to lay off employees at night and rehire them in the morning, presumably to avoid Respondents' obligation under the 40-hour guarantee provision. According to McCool, Russell responded that the contract did not prohibit that practice, although Respondents might have trouble retaining employees with that practice. McCool responded that if the Union could not provide workers, then Respondents would hire from sources other than the Union. McCool stated that Russell did not object to Respondents' not complying with the 40-hour guarantee clause. McCool conceded, however, that no union official specifically told him that he would not be required to comply with the 40-hour guarantee clause. According to McCool, he then laid off employees in the evening and rehired them in the morning.

Union official Russell testified that McCool asked him for ''relief'' of the 40-hour guarantee clause. Russell refused to do so, and also told him that the 40-hour guarantee was in the contract and that he would have to abide by it.

I reject McCool's argument that Respondents were relieved of the contractual requirement to pay the guaranteed 40 hours' pay. Russell denied waiving the contractual provision and no written evidence was offered of such a waiver.

Regarding the alleged expiration of the contract on October 1, 1987, in support of Respondents' position, McCool testified that in June or July 1986, he met with union officials and advised them that Respondents were going out of business due to financial reasons. He also told them that he was looking ''very favorably'' at another union, the Plumbers International Union (UA), and was attempting to negotiate an agreement with that union. McCool testified that he told union officials at that meeting that he had no intention of signing a new contract with the Union, was going to cancel Respondents' contract with the Union, and that they did not comment on his statement. He further testified that union officials did not ask him to negotiate a successor agreement to the contract which expired on October 1, 1987.

Article XXIII of the collective-bargaining agreement provides as follows:

> This Agreement shall be in full force and effect from December 1, 1984, and shall continue until midnight, October 1, 1987, automatically renewing itself for additional periods of one (1) year each from year to year thereafter unless written notice is given by either party sixty (60) days prior to October 1, 1987 . . . of a desire to open the Agreement to negotiate any changes.

McCool conceded that he did not provide the Union with written notification that he wished to renegotiate the agreement. Accordingly, inasmuch as the contract automatically renewed itself, by its terms, it did not expire until October 1, 1988. Therefore, Respondents were obligated to abide by its terms, in this regard, until it closed its operation in August 30, 1988.

McCool does not dispute the computations or the figures in the specification concerning this issue. It should be noted that the guarantee is sought only for those weeks within which the employee involved actually worked or was paid.

Accordingly, I find, as set forth in Appendix 3 of the specification, that the following amounts are due the following employees:

Brian Hale	$539.05
Gary Whisenhunt	124.74
David Geisendorfer	1739.61
Kim Geisendorfer	678.25
Randy Pridenmore	798.00

The specification sets forth that Jon Coulson is entitled to $27 pursuant to the 40-hour guarantee provision, which was earned in the third quarter of 1986. McCool argues that Coulson is a statutory supervisor or official of Respondents and therefore not protected by the provisions of the Act. I agree.

The Board found that on July 1, 1986, Coulson and McCool operated Amspec as partners, Coulson owning 20 percent of the business, and that Coulson operated as the operations manager of Amspec and the supervisor of its employees. The Board further found that he solicited business and handled other managerial tasks. 297 NLRB at 753.

Based on the above, Coulson became a supervisor on July 1, 1986, the beginning of the third quarter of 1986. Accordingly, I cannot find that Coulson was a statutory employee at the time that Respondents were required to make whole their employees. I, therefore, find that they had no obligation to make Coulson whole pursuant to the 40-hour guarantee provision.

The Failure to Pay the Contractual Wage Rate

The specification alleges that Respondents failed to pay David Geisendorfer and Kim Geisendorfer the contractual wage rate between January 1, 1987, and August 30, 1988, the date Respondents ended their New Jersey operations. McCool admits the accuracy of the computations, and the Respondents' failure to pay those amounts, but contests its obligation to pay those amounts beyond the termination date of the collective-bargaining agreement, October 1, 1987.

Inasmuch as this issue is discussed above, and I have rejected McCool's argument that the contract expired on October 1, 1987, I find as set forth in the specification, that Kim Geisendorfer is entitled to $218.59, and that David Geisendorfer is entitled to $2,811.41, the difference between what they were paid, and the amount they should have received pursuant to the collective-bargaining agreement.

The Failure to Pay Pension, Health, and Welfare Contributions

The specification asserts that Respondents were required to make contributions to certain pension, health, and welfare funds. McCool admits that it was Respondents' contractual obligation to make such contributions, and further admits that they failed to make such contributions between April 2, 1986, and August 30, 1988, the date that they ended their New Jersey operations. McCool further admits the specific contribution rates, and the computations as set forth in the specification.

However, McCool asserts that Respondents' obligation to make such contributions expired on July 29, 1986, with re-

spect to Barrett, as set forth above, since he would not have been employed thereafter due to the layoff of all level 1 technicians. Respondent also asserts that Coulson is not entitled to any contributions.

McCool further argues that Respondents' obligation pursuant to their collective-bargaining agreement ended when he orally repudiated the contract in early 1986, or at the latest, when the contract expired by its terms on October 1, 1987.

First, I have rejected, above, McCool's argument that the collective-bargaining agreement expired at any time prior to October 1, 1988, since it had been automatically renewed due to Respondents' failure to give the contractually required written notice. I accordingly find that the collective-bargaining agreement, having been automatically renewed for 1 year, expired on October 1, 1988.

The specification provides that pension, health, and welfare contributions in behalf of Coulson, were required to be paid beginning the third quarter of 1986, for a total of $4,914.22. Inasmuch as I have found, above, that Coulson was a statutory supervisor, and an official of Respondents on July 1, 1986, and there has been no evidence that he was an employee of Respondents on July 1, 1986, covered by the collective-bargaining agreement, I cannot find that the specification should be applied to him in this respect. I accordingly will dismiss the specification as it relates to Coulson.

The specification provides that pension, health, and welfare contributions in behalf of Barrett were required to be paid from the second quarter of 1986 through the second quarter of 1988, sometime before Respondents closed their New Jersey operations in August 1988.

I have found, above, in agreement with McCool's argument, that Barrett would have been laid off with the other level 1 employees, no later than July 29, 1986. Accordingly, Barrett was entitled to contributions to be made in his behalf, as set forth in the specification, for the second quarter of 1986, ending June 30, 1986, of $396.34 for pension, and $707.75 for health and welfare.

Barrett was also entitled to contributions to be made in his behalf for the month of July 1986. The specification states that Respondents were required to make contributions of $384.93 for pension, and $687.37 for health and welfare in behalf of Barrett for the third quarter of 1986. Since no information was given as to what week or weeks those contributions were earned, I have taken the two amounts, and divided them by the 13.2 weeks in that quarter, and obtained an average amount of pension and health and welfare contributions which should have been made in the third quarter of 1986.

Thus, an average of $29.16 for pension per week, and $52.07 for health and welfare per week should have been contributed for Barrett in the third quarter of 1986. Those amounts multiplied by the 4 weeks in July 1986 equals $116.64 for pension, and $208.28 for health and welfare, which should have been contributed for Barrett for July 1986.

Thus, the totals for Barrett are $512.98 for pension, and $916.03 for health and welfare.

Accordingly, the contributions required to be paid in behalf of Respondents' other employees for pension and health and welfare, as set forth in the specification, are as follows:

	Pension	*Welfare*
Barrett	$512.98	$916.03
Hale	263.90	471.25
Whisenhunt	330.40	590.00
D. Geisendorfer	4,936.36	9,142.79
Pridenmore	466.55	833.12
K. Geisendorfer	22.80	42.75

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

It is ordered that the Respondents, Omnitest Inspection Services, Inc; Amspec Technical Services, a Partnership; and Amspec Technical Services, Inc., Woodbridge, New Jersey, their officers, agents, successors, and assigns, shall make whole the employees involved by the payment to them of the amounts set forth below, and shall make contributions in their behalf, as set forth below, plus interest thereon.

IT IS FURTHER ORDERED that those allegations of the compliance specification be dismissed which allege that Daniel McCool is personally liable for the backpay due.

IT IS FURTHER ORDERED that those allegations of the compliance specification be dismissed which allege that Jon Coulson is entitled to any backpay, or that contributions be made in his behalf.

	Backpay	*Pension*	*Health & Welfare*	*40 Hr. Qtr.*	*Contractual Wage*	*Total*
Barrett	$7,439.67	$512.98	$916.03			$8,868.68
Hale		263.90	471.25	$539.05		1,274.20
Whisenhunt		330.40	590.00	124.74		1,045.11
D. Geisendorfer		4,936.36	9,142.79	1,739.61	$2,811.41	$18,630.17
Pridenmore		466.55	833.12	798.00		2,097.67
K. Geisendorfer		22.80	42.75	678.25	218.59	962.39

[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.